

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

|                                  |   |                        |
|----------------------------------|---|------------------------|
| <b>UNITED STATES OF AMERICA,</b> | : | <b>CRIMINAL ACTION</b> |
|                                  | : |                        |
| <b>v.</b>                        | : |                        |
|                                  | : | <b>No. 10-524</b>      |
| <b>SHACOY MCNISH</b>             | : |                        |

**MEMORANDUM**

**Schiller, J.**

**March 25, 2011**

A twenty-seven count third superseding indictment charges Shacoy McNish with conspiracy, fraud, counterfeiting, aggravated identity theft, and being a felon in possession of a weapon. He has filed a motion to suppress numerous pieces of evidence that the Government intends to introduce at his trial. On March 24, 2011, the Court conducted a hearing on the suppression motion. The Court denied the motion from the bench. This Memorandum provides the reasons for that denial.

**I. BACKGROUND**

On July 1, 2010, a warrant was issued for McNish's arrest on charges of forgery, conspiracy, identity theft, and weapons violations. (Gov't's Opp'n to Def.'s Mot. to Suppress Evidence Ex. 1 [Arrest Warrant].) The arrest warrant was issued based on the facts contained in the affidavit of Detective James Henwood. Detective Henwood stated that on May 20, 2010, an African-American woman entered a gun shop in Philadelphia accompanied by two African-American males. (*Id.*) The woman completed paperwork to purchase a handgun. (*Id.*) After she paid for the weapon, the Philadelphia Instant Check System indicated that the identification used to buy the gun was not genuine and Philadelphia police were notified to respond to the gun shop. (*Id.*) The woman cancelled the sale and left the store with the two men before the police arrived. (*Id.*) The in-store

video of the incident showed that one of the males was McNish. (*Id.*) Police contacted the woman whose identity was used in an attempt to buy the gun, and she informed the police that she was the victim of identity theft and that she did not try to buy a weapon on May 20, 2010 or authorize anybody to do so on her behalf. (*Id.*) Detective Henwood's investigation led him to an identity theft case in Upper Darby for which Detective Henwood sought information from Detective Louis Panagoplos. (*Id.*) Detective Panagoplos showed Detective Henwood a picture of McNish, who had been arrested in the Upper Darby identity theft case. (*Id.*) Detective Henwood recognized the man in the picture as one of the men in the in-store video that depicted the May 20, 2010 gun purchase. (*Id.*) Further investigation revealed another individual who identified the man in the in-store video as McNish. (*Id.*)

Based on the arrest warrant, Henwood and a number of other officers went to 419 Millbank Road in Upper Darby to arrest McNish. Upon gaining entry to the residence, the officers encountered a woman in the house who failed to immediately answer whether McNish was inside. Special Agent Matthew Cimino located McNish, apparently asleep, in an upstairs bedroom. He awakened McNish and pulled off the bed covers in search of a gun. McNish was undressed at the time and asked if he could put on clothes. He was permitted to get dressed and was not handcuffed. Officers in the bedroom did a quick search of the area immediately around McNish and searched his clothes to ensure no weapons were present. As part of the search, officers, including Detective Henwood, lifted the bed's mattress to see if any weapons were hidden underneath shortly after McNish stood up. In his experience, Detective Henwood had seen arrestees stash contraband under mattresses. Officers found no weapons in the immediate area but did see financial documents under the mattress, including financial documents in the names of persons unassociated with the residence.

Officers in McNish's room contacted Detective Panagoplos and told him they had arrested McNish and found financial documents. Based on this information, Panagoplos prepared an affidavit for a search warrant for 419 Millbank Road. He presented the application to Delaware County Magistrate Judge Christopher R. Mattox, who signed it and wrote his magistrate number on the search warrant. (Gov't's Opp'n to Def.'s Mot. to Suppress Evidence Ex. 2 [Search Warrant].) Upon executing the search warrant, officers found two rifles, including one with an defaced serial number, numerous identifying documents, and counterfeit checks.

## **II. STANDARD OF REVIEW**

The movant bears the burden of proving, by a preponderance of the evidence, that the evidence in question should be suppressed. *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995) (citing *United States v. Acosta*, 965 F.2d 1248, 1256 n.9 (3d Cir. 1992)). "However, once the defendant has established a basis for his motion, *i.e.*, the search or seizure was conducted without a warrant, the burden shifts to the government to show that the search or seizure was reasonable." *Johnson*, 63 F.3d at 245.

## **III. DISCUSSION**

McNish claims the search under his mattress was illegal because it went beyond the scope of an appropriate search incident to arrest. He also argues that any material recovered based on the search warrant should be suppressed because it was the fruit of the illegal search incident to arrest. Finally, he argues that the search warrant is invalid because "it appears that the signature of the issuing authority on the Application for Search Warrant and Authorization as well as the Search

Warrant Probable Cause Affidavit is that of Detective Panagoplos, the affiant on the search warrant. As such, Detective Panagoplos knew the warrant was not obtained from a neutral magistrate and therefore was facially deficient.” (Def.’s Mem. in Supp. of Mot. to Suppress Evidence at 5.)

The Court will quickly dispose of the third argument. Detective Panagoplos testified under oath that a neutral magistrate signed and stamped with a seal the search warrant while in Detective Panagoplos’s presence. Defendant has levied a serious accusation against this officer and it appears baseless. The Court rejects the contention that the search warrant was forged.

McNish’s argument that the financial document discovered under the mattress must be suppressed lacks merit. Police officers may conduct a search incident to a lawful arrest. *Chimel v. California*, 395 U.S. 752, 763 (1969). The scope of that search includes the area into which an arrestee might reach in order to grab a weapon or evidentiary items. *Id.* Defendant concedes that officers could have lawfully searched for weapons or evidence relating to the crime for which the arrest warrant was issued. (Def.’s Mem. in Supp. of Mot. to Suppress Evidence at 2.) He appears to contend that because the affidavit in support of the arrest warrant focuses on weapons violations and one particular attempt to buy a gun, any evidence uncovered that does not support the averments in the affidavit must be suppressed.

This argument is both factually and legally incorrect. The arrest warrant goes into much greater detail than one attempt to purchase a gun. It paints McNish as involved in counterfeiting and stealing identities. Furthermore, the case law on searches incident to arrest focus on the area searched, not what is ultimately discovered. *See United States v. Shakir*, 616 F.3d 315, 320 (3d Cir. 2010) (“[P]olice cannot search a location or item when there is no reasonable possibility that the suspect might access it.”). A valid search does not violate the Fourth Amendment because the police

found something incriminating other than weapons. As the Government notes, Defendant's argument would produce an odd result: had the officers found drugs upon lifting the mattress, the Government would be barred from introducing that contraband at trial. Defendant cites no case law to support this result.

The question for this Court is thus whether lifting up the mattress while arresting McNish violated his Fourth Amendment rights. A number of courts have concluded that a search under a nearby mattress conducted pursuant to a valid arrest does not violate the Fourth Amendment.<sup>1</sup> *See, e.g., United States v. Bennett*, 555 F.3d 962, 967-68 (11th Cir. 2009) ("If there is reason to search the edge of a mattress by touch, there is reason enough to lift it up."); *United States v. Hernandez*, 941 F.2d 133, 137-38 (2d Cir. 1991); *Watkins v. United States*, 564 F.2d 201, 204-05 (6th Cir. 1977); *United States v. Snard*, Crim. A. No. 09-212, 2009 WL 3105271, at \*8-9 (E.D. Pa. Sept. 27, 2009); *United States v. Yanez*, 490 F. Supp. 2d 765, 776 (S.D. Tex. 2007); *United States v. Parker*, Crim. A. No. 05-505, 2006 WL 163562, at \*4-5 (D. Ariz. Jan. 20, 2006).

McNish was not handcuffed as he was getting dressed. He posed a potential threat to officers and could easily have destroyed evidence. Detective Henwood also testified that he was aware McNish had a history of violence including an attempted murder charge. Searching the areas that he could readily access, including under the mattress, was reasonable under the circumstances. The search was conducted close in time to the arrest and went no further than necessary to ensure the safety of the officers and to ensure that no evidence was disturbed. The search incident to arrest was

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<sup>1</sup> Although the Government relies on *United States v. Massenberg*, 45 F. App'x 115 (3d Cir. 2002), this Court does not. In *Massenberg*, the Third Circuit upheld a search incident to arrest but found it important that the district court found that "the shotgun was located underneath the bed and not in between the mattress and the box spring." *Id.* at 119. Additionally, *Massenberg* was handcuffed at the time of the search. *Id.* at 120.

valid and the evidence found as result of the search warrant is not the fruit of the poisonous tree. The Government may thus introduce any evidence obtained pursuant to the arrest and any evidence uncovered pursuant to the search warrant.

#### **IV. CONCLUSION**

McNish's Fourth Amendment rights were not violated by either the search incident to arrest or the search pursuant to the search warrant. His motion is denied. An Order consistent with this Memorandum will be docketed separately.

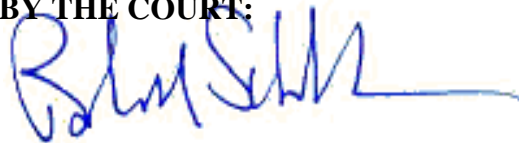
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**ORDER**

**AND NOW**, this 25<sup>th</sup> day of **March, 2011**, upon consideration of Defendant's Motion to Suppress Evidence, the Government's response thereto, and following a suppression hearing on March 24, 2010, it is hereby **ORDERED** that the motion (Document No. 48) is **DENIED**.

**BY THE COURT:**



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**Berle M. Schiller, J.**